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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORWEST BANK DULUTH, N.A.,
Petitioner,

v.

MINNESOTA COMMISSIONER OF REVENUE
and the STATE OF MINNESOTA,
Respondents.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

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BRIEF OF THE COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTRODUCTORY STATEMENT 1

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

WHEN A TAXPAYER HAS PAID A TAX THAT DISCRIMINATES AGAINST THE FEDERAL GOVERNMENT IN VIOLATION OF FEDERAL LAW AND THE SUPREMACY CLAUSE, THE ONLY MEANINGFUL REMEDY AND THE REMEDY REQUIRED BY THE DUE PROCESS CLAUSE IS THE PAYMENT OF REFUNDS 4

CONCLUSION 8

TABLE OF AUTHORITIES

CASES — Page

Cambridge State Bank v. James, 480 N.W.2d 647 (Minn. 1992) 3, 5, 6, 7
Cambridge State Bank v. Roemer, 457 N.W.2d 716 (Minn. 1990) 3
Harper v. Virginia Department of Taxation, 242 Va. 322, 410 S.E.2d 629 (1991), *cert. granted*, 60 U.S.L.W. 3779 (1992) 3
James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 2, 7
McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 3, 4, 6, 7, 8
Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983) 2, 6
Moses Lake Homes v. Grant County, 365 U.S. 744 (1961) 3
United States v. City of Spokane, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2888 (1991) .. 4

STATUTES

31 U.S.C. 742 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2047

NORWEST BANK DULUTH, N.A.,
Petitioner,

v.

MINNESOTA COMMISSIONER OF REVENUE
and the STATE OF MINNESOTA,
Respondents.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

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BRIEF OF THE COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation as *amicus curiae* in support of the petitioner in the above captioned matter. Written consents of the petitioner and respondents have been obtained and filed with the Clerk of Court.

INTEREST OF *AMICUS CURIAE*

The Committee on State Taxation ("COST") is a nonprofit association, which was originally organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated January 1, 1992, has a membership of 372 major

multistate corporations. COST member companies conduct a substantial portion of the interstate commerce of United States taxpayers and are representative of that part of the nation's business sector which is directly affected by state taxation of interstate operations.

COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of corporations doing business in more than one taxing jurisdiction. This objective is accomplished, in part, through the promotion of procedural rights of taxpayers. One such procedural right is the right to a remedy when a state tax is found to be illegal or unconstitutional. Therefore, COST has a great interest in the instant case, in which the State of Minnesota has denied taxpayers any remedy, even though the tax at issue has been held to be illegal and unconstitutional pursuant to this Court's decision in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983).

SUMMARY OF ARGUMENT

This case involves the inclusion in a State's tax base of federal obligation interest while certain state obligation interest was excluded in violation of a federal statute and the intergovernmental tax immunity doctrine under the Supremacy Clause. In accordance with this Court's decision in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), which invalidated a virtually identical tax scheme, the Minnesota Supreme Court properly held that the State's taxation of federal obligation interest was unconstitutional. The Minnesota Supreme Court also correctly held, on remand from this Court, that consistent with this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), the holding in *Memphis Bank* must be applied retroactively. Nevertheless, under the guise of "state procedural bars", the Minnesota Court refused to grant any remedy to the taxpayer in this case.

The refusal of the Minnesota Supreme Court to grant a remedy where an illegal and unconstitutional tax has been collected by the State is a not too subtle attempt to protect the State treasury at the expense of due process rights of taxpayers. The court's refusal to require refunds of taxes collected in violation of 31 U.S.C. § 742 fails to give effect to that statute and fails to remedy the Supremacy Clause violation.

This Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) makes clear that due process requires that a state provide a clear and certain remedy where it has exacted an illegal or unconstitutional tax. In this case, the tax unconstitutionally discriminated against the federal government, and, therefore, is void and may not be exacted. *Moses Lake Homes v. Grant County*, 365 U.S. 744, 752 (1961). And, when a State attempts to impose a tax which is beyond the State's power to impose, as is the case here, "[t]he State would have no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid", *McKesson, supra* at 2251, in order to comport with due process.

The Minnesota Supreme Court, in both its original decision, *Cambridge State Bank v. Roemer*, 457 N.W.2d 716 (Minn. 1990), and on remand, *Cambridge State Bank v. James*, 480 N.W.2d 647 (Minn. 1992), has given no more than lip service to the Due Process Clause, the Supremacy Clause, federal law and the precedents of this Court. While this case involves the right to a remedy and *Harper v. Virginia Dept. of Taxation*, 242 Va. 322, 410 S.E.2d 629 (1991) *cert. granted*, 60 U.S.L.W. 3779 (1992), involves the retroactive application of a decision of this Court, in both cases, the state courts have flouted taxpayers' constitutional right in a blatant attempt to protect the state treasury. The United States Court of Appeals for the Ninth Circuit recognized that where a tax has been exacted from a federal instrumentality, as is the

cases here, "[t]he only logical relief, aside from precluding further taxation, is to order the improperly taken monies refunded." *United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2888 (1991). The Minnesota Supreme Court is unwilling and unable to recognize this rule without an express order from this Court. Therefore, this Court should grant certiorari and reverse the decision of the Minnesota Supreme Court.

ARGUMENT

WHEN A TAXPAYER HAS PAID A TAX THAT DISCRIMINATES AGAINST THE FEDERAL GOVERNMENT IN VIOLATION OF FEDERAL LAW AND THE SUPREMACY CLAUSE, THE ONLY MEANINGFUL REMEDY AND THE REMEDY REQUIRED BY THE DUE PROCESS CLAUSE IS THE PAYMENT OF REFUNDS

In *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 22 (1990), this Court stated that its precedents

> establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

This holding requires that the State of Minnesota refund the unconstitutionally collected tax in this case. The only "meaningful backward-looking relief", *McKesson*, *supra* at 31, for due process purposes where a federal statute and the intergovernmental tax immunity doctrine under the Supremacy Clause have been violated is the refund of the illegal tax. *See*, Petitioners' Petition for Writ of Certiorari at 11-12.

Nevertheless, in determining the appropriate remedy, the Minnesota Supreme Court held that the refund of the

illegal taxes was not required. The Minnesota court found that *McKesson* should be distinguished "on the ground that tax schemes invalidated under the commerce clause involve considerations of comparative economic disadvantage which are not present here." *Cambridge State Bank v. James*, 480 N.W.2d 647, 653 (Minn. 1992) ("Cambridge II"). In so holding, the court failed to take the next obvious step and look to the considerations that are at play where the tax scheme is invalidated under a federal statute, the Supremacy Clause and the doctrine of intergovernmental immunity. If the court had done so, it may have still distinguished *McKesson*, but only to hold that in this case the refunding of taxes is the only remedy available to protect those considerations.

The federal law at issue, 31 U.S.C. § 742, provided:

> Except as otherwise provided by law, *all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.* This exemption extends to every form of taxation that would require that the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.[1]

Unlike the Commerce Clause, which is intended to prevent discriminatory treatment that will cause economic disparities for interstate taxpayers, the statute at issue is intended to protect the federal government. It is a statutory restatement of "the constitutional rule of tax immunity established in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), [that] 'States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government.' *United States v. County of Fresno*, 429 U.S. 452,

[1] This statute is now codified, with minor amendments not affecting the language at issue herein, at 31 U.S.C. § 3124(a).

459 (1977)." *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397 (1983). The Constitutional infirmity in the challenged tax is not that it discriminates against the taxpayer in favor of any other person, but that it discriminates against federal obligations in favor of securities issued by the State. See, *Memphis Bank*, *supra*, at 398. Thus, it is the illegal taxation of the federal government that is the harm to be remedied. The only means of remedying this constitutional and statutory violation is to require the refund of the illegally collected tax.[2]

The Minnesota Supreme Court has somehow convinced itself that by severing the exemptions for state obligations, but refusing to either impose a retroactive tax or grant refunds of the illegal tax paid on federal obligations, it has provided "meaningful backward looking relief," as required in *McKesson*, *supra* at 31. In fact, the court, quite obviously, provided no relief at all. The court's actions, taken together, leaves in place the illegal and unconstitutional tax scheme, providing no remedy to the taxpayer and no protection to the federal government from state taxation.

The Minnesota court's most disingenuous rationale for denying the taxpayer a refund of the illegally collected tax is that the taxpayer is estopped from claiming a refund because it also held some of the exempt state bonds and it did not remit taxes on the interest received from these bonds. Thus, according to the Minnesota Su-

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[2] *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco* 496 U.S. 18, 40 (1990) held that, consistent with due process, the State of Florida could cure the commerce clause violation by either granting a refund or by collecting back taxes from the taxpayer's competitors. However, retroactive assessment beyond "some temporal point" may "violate due process by unduly interfering with settled expectations." *McKesson*, *supra* at 40, fn. 23. In this case, the Minnesota Supreme Court specifically held that the retroactive assessment of tax against purchasers of exempt state obligations would be unconstitutional. *Cambridge State Bank v. James*, 480 N.W.2d 647, 654 (1992). Thus, such a remedy is not at issue in this case.

preme Court, the taxpayer is left without a remedy because it filed its return in compliance with State law and took advantage of exemptions available to it and then had the temerity to challenge one provision of the State's tax scheme. This argument must be rejected for two reasons. First, the acceptance of the benefits doctrine is not the type of procedural bar to refunds envisioned by this Court in *McKesson*, *supra* and *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991). Second, as shown in Petitioner's Brief, the court below did not properly apply the doctrine in this case. Petition for Writ of Certiorari, at 22-24.

In *McKesson*, this Court recognized that the State of Florida "could invoke, as an independent basis for denying the refund, taxpayer's failure to comply with the notice requirement that was in effect at the time of the tax payments", such as a requirement that the payment be made under protest or that notice of a refund claim be given with a certain time period. 496 U.S. at 25, fn.4; 45. Similarly, in *Beam*, this Court recognized that the State could raise "procedural bars to recovery under state law", 111 S. Ct. at 2443, stating that a statute of limitations would be such a procedural barrier. *Id.* Thus, while states can raise procedural bars to the payment of refunds, it is clear from these cases that this Court envisioned such procedural bars to be just that—instances where a taxpayer failed to follow the statutorily mandated procedures for claiming a refund of taxes paid to the State. There has been no suggestion in this case that the taxpayer did not fully comply with state refund procedures and there are no independent state grounds to justify the denial of refunds.

The Minnesota Supreme Court has blatantly ignored this Court's decision in *McKesson* in an attempt to protect the State's treasury. It looked to the State's "equitable interests", that is, "its potential liability", *Cambridge II*, *supra* at 654, as justification for its decision even though such equitable considerations were explicitly re-

jected by this Court as grounds for providing only prospective relief. *McKesson*, *supra* at 44, 45.

The Minnesota Supreme Court has ignored due process and the precedents of this Court in order to allow the State to retain taxes that were collected in violation of a federal law and the Supremacy Clause. While COST recognizes the importance of fiscal integrity to a State, the State may still protect itself by providing refunds on an installment basis or as credits against future taxes.[3] See, *McKesson*, *supra* at 45. Due Process requires that a meaningful remedy be granted in this case. Under the circumstances in this case, the only available remedy that addresses the concerns of the statute, provides meaningful relief and comports with due process is the granting of refunds.

CONCLUSION

For the reasons set forth above, the Committee on State Taxation respectfully requests that petitioner's petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: July 21, 1992

[3] The State must, of course, still pay interest as provided by statute should it choose to pay refunds by either of these two options.